ALAN WILSON
ATTORNEY GENERAL

May 21, 2014

The Honorable Don Bowen
Member, House of Representatives
306-C Blatt Building
Columbia, SC 29211

Dear Representative Bowen:

This Office received your request for an opinion regarding whether the City of Anderson can charge people who live outside the city limits higher rates for water than it charges its residents.

LAW/ANALYSIS:

We have addressed this issue in a prior opinion. In Op. S.C. Atty. Gen., February 24, 2012, (2012 WL 719481), we were asked whether or not the City of Cayce was obligated to provide the same water and sewer rates to the Airport District as it charged resident customers. We opined:

> S.C. Code Ann. § 5-7-60 provides general authority for municipalities to provide services outside their corporate limits. This provision states:
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> > [a]ny municipality may perform any of its functions, furnish any of its services, except services of police officers, and make charges therefor and may participate in the financing thereof in areas outside the corporate limits of such municipality by contract with any individual, corporation, state or political subdivision or agency thereof or with the United States Government or any agency thereof, subject always to the general law and Constitution of this State regarding such matters, except within a designated service area for all such services of another municipality or political subdivision, including water and sewer authorities, and in the case of electric service, except within a service area assigned by the Public Service Commission pursuant to Article 5 of Chapter 27 of Title 58 or areas in which the South Carolina Public Service Authority may provide electric service pursuant to statute. For the purposes of this section designated service area shall mean an area in which the particular service is being provided or is budgeted or funds have been applied for as certified by the governing body thereof. Provided, however, the

> limitation as to service areas of other municipalities or political subdivisions shall not apply when permission for such municipal operations is approved by the governing body of the other municipality or political subdivision concerned.

Based on our research, we have previously advised that fees charged to nonresidents are governed by contract, as opposed to statute. See Op. S.C. Atty. Gen., September 27, 2011. Section 5-31-1910 specifically addresses a municipality's ability to furnish water outside of its municipal boundaries. This provision states:

> [a]ny city or town in this State owning a water or light plant may, through the proper officials of such city or town, enter into a contract with any person without the corporate limits of such city or town but contiguous thereto to furnish such person electric current or water from such water or light plant of such city or town and may furnish such water or light upon such terms, rates and charges as may be fixed by the contract or agreement between the parties in this behalf, either for lighting or for manufacturing purposes, when in the judgment of the city or town council it is for the best interest of the municipality so to do. No such contract shall be for a longer period than two years but any such contract may be renewed from time to time for a like period.

Thus, a municipality may provide water service outside of its corporate limits but contiguous thereto.[1]

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[1] In Op. S.C. Atty. Gen., 2012 WL 719481, supra, the footnote stated:

> There are other mechanisms by which a municipality may furnish its water and/or sewer service to property beyond its corporate boundaries. For example, §§ 5-31-1920 and -1930 change the time limit and eliminate the contiguity requirement of § 5-31-1910, but these provisions apply only to cities of a certain minimum population. On the other hand, § 5-31-1520 permits a city to extend its water and sewer systems to any property beyond the corporate limits, and it states neither a time limit nor a threshold population. In an opinion dated September 27, 2011, we noted that "... a municipality may choose freely among the available mechanisms for extending its water or sewer system, provided the municipality complies with the specific requirements of the chosen mechanism and with the general requirements found in section 5-7-60 of the South Carolina Code."

Further, in an opinion dated July 17, 1989, we addressed whether the City of Columbia could charge different rates to nonresidents for municipal services. We noted the authority given to municipalities in §§ 5-7-60 and 5-31-1910, and cited to an opinion of this office dated February 5, 1976, construing § 5-31-1910, that stated a "nonresident purchaser of water from a municipality would have only those rights set forth or necessarily implied from the contract to sell and furnish water, and further that the non-resident has no rights beyond those in the contract." In addition, we reviewed the statutory authority allowing municipalities to provide services to nonresidents. We thus stated:

> ... the establishment of higher rates or charges for the provision of water or sewer services to nonresident customers is not covered by statute but is instead a matter of contract. This Office has advised previously that a municipality has considerable discretion in entering into contracts to provide its services to persons residing outside municipal boundaries. [Op. S.C. Atty. Gen., December 22, 1986]. As noted therein, the use of the term " "may" in Section 5-7-60 "indicates that extra-territorial provision of services by a municipality, by contract with an individual, is within the discretion of the municipality." The setting of rates thus appears to be within the discretion of the municipality, as well; we have identified no authority which requires city residents and nonresidents to be charged the same rates. See also [Op. S.C. Atty. Gen. February 5, 1976].

Subsequent to our 1989 opinion, the South Carolina Supreme Court issued an opinion as to whether the City of Conway had a duty to charge nonresidents a reasonable fee for water service. Sloan v. City of Conway, 347 S.C. 324, 555 S.E.2d 684 (2001). According to the facts of the case, the City of Conway passed an ordinance raising rates for nonresident customers for a reason unrelated to the service provided to the nonresidents. A nonresident alleged a charge of four times that charged residents was excessive and exorbitant. Id., 555 S.E.2d at 685. The Court concluded as follows:

> [o]ur decision in Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911), is dispositive here. In Childs, we held a municipality has "no public duty to furnish water to [a nonresident] at reasonable rates or to furnish it at all." 70 S.E. at 298. Any right a nonresident has arises only by contract. Further, a city actually has "an obligation to sell its surplus water for the sole benefit of the city at the highest price obtainable." Id. (emphasis added). We concluded the nonresident plaintiff had no

> basis to challenge the out-of-city rate which, in that case, was four times the in-city rate. See also Calcaterra v. City of Columbia, 315 S.C. 196, 432 S.E.2d 498 (Ct. App. 1993) (following Childs and holding higher rates for out-of-city water customers cannot be challenged under the S.C. Unfair Trade Practices Act).

City of Conway, 555 S.E.2d at 686.

Based upon Childs, the Court determined that, "[a]bsent a specific legislative directive, there is no reasonable rate requirement for water service to nonresidents ... Further, under Childs, [the City of Conway's] duty to appellants arises only from contract." City of Conway, 555 S.E.2d at 687. Thus, the Court concluded that, "[b]ecause City has no duty to charge reasonable rates other than by agreement, and its rates comply with this agreement, summary judgment was properly granted." Id. The South Carolina Court of Appeals came to a similar conclusion in Calcaterra. That Court considered whether the City of Columbia could charge higher water rates to nonresidents. The Court stated:

> [t]he Supreme Court has held that the municipal governing body in setting rates for services outside the corporate limits is to be guided by the best interests of the municipality and has an obligation to sell surplus water for the highest price obtainable.

Id., 432 S.E.2d at 499 [citing Childs].

Because the terms offered to nonresidents are a matter of contract, so long as the nonresident authority agrees to the terms offered by the municipality, a court is not likely to question the agreement. We have previously advised that there is no requirement that municipalities provide service to nonresidents on reasonable terms. Op. S.C. Atty. Gen., June 16, 2011; see also Op. S.C. Atty. Gen., February 5, 1976 ["A nonresident purchaser of water from a municipality has only those rights set forth or necessarily implied from the contract to sell and furnish water and the nonresident has no rights beyond the contract"]. In other words, a municipality may profit from providing water to nonresidents. Id. [citing Sossamon v. Greater Gaffney Metropolitan Utilities Area, 236 S.C. 173, 113 S.E.2d 534 (1960)]; see Op. S.C. Atty. Gen., June 30, 2006.

In this prior opinion, we concluded that current state law does not require the City of Cayce to charge its residents and the Airport District the same water rates, unless otherwise provided for by contract. Due to South Carolina statutes and case law providing that a municipality may (but is not obligated) to provide services outside its corporate limits, that fees charged to nonresidents by municipalities for water are governed by contract, that a municipality has no duty to charge nonresidents a reasonable fee for water

service, and that a city has an obligation to sell surplus water at the highest price obtainable, the City of Anderson can charge people who live outside the city limits higher rates for water.

You questioned whether charging higher rates to nonresidents would be a violation of the "equal protection" clause of Article I, section 3 of South Carolina's Constitution. Article I, section 3 states:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

S.C. Const. art. I § 3.

In a prior opinion, we stated the following:

> The courts have found that the requirements of equal protection are satisfied if (1) the classification bears a reasonable relationship to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on a reasonable basis. *Smith v. Smith,* 291 S.C. 420, 354 S.E.2d 36 (1987).
>
> Our Supreme Court addressed the Equal Protection question in *Sloan v. City of Conway*, 347 S.C. 324, 555 S.E.2d 684 (2001). There, the Court rejected the argument that a municipality possesses a duty to charge reasonable rates for water to non-resident customers. Citing *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911) which had upheld an out-of-city water rate which was four times that of residents, the Court in *Sloan* concluded that "[a]bsent a specific legislative directive, there is no reasonable rate requirement for service to nonresidents." 347 S.C. at 330. The Court further held that any service at all to nonresidents "arises only from contract." *Id.* at 331. Thus, according to the *Sloan* Court, "[b]ecause City has no duty to charge reasonable rates other than by agreement, and its rates comply with this agreement, summary judgment was properly granted." *Id.* at 331.
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> With respect to any Equal Protection argument, the Court likewise rejected such contention. In the Court's view, Equal Protection is not violated, if "there is any reasonable basis to support" a legislative classification. *Id.*, no. 10. The Court noted that "[h]ere out-of-city customers pay no taxes to City and this is a reasonable basis for disparate treatment." With respect to any argument that the disparate charges to out-of-city customers violate the Due Process Clause, the Court dismissed such argument, noting that "[r]aising revenue is a legitimate

> governmental goal and selling water at higher rates to customers who do not pay taxes is rationally related to this goal. *Id.*

Pursuant to the Sloan case, it does not violate either the "equal protection" or the "due process" clauses of the South Carolina Constitution for the City of Anderson to charge people who live outside the city limits more for water.

You also asked whether Title 58 of the South Carolina Code of Laws would be violated by a municipality charging higher water rates to nonresidents. Title 58 addresses Public Utilities, Services, and Carriers. In Title 58, a statute provides that the Public Service Commission[2] and regulatory staff do not have the power to regulate or interfere with public utilities owned or operated by a municipality, with the exception of government-owned communications service providers. S.C. Code Ann. § 58-5-30 (1976 Code, as amended). Therefore, Title 58 is not applicable to a municipality which provides water.

In your letter, you mentioned that the water rates charged by the City of Anderson to people living outside the city were like "taxation without representation." In a prior opinion, we stated that "[t]he most common challenge to extension of services outside municipal limits has been that of taxation without representation" and we concluded:

> It would appear, at least facially, that since no taxes are being imposed on property owners outside the municipality, there is no taxation without representation. Cf., City of Prichard v. Richardson, 17 So.2d 451 (Ala. 1944); Atlantic Oil Company, Inc. v. Town of Steele, 214 So.2d 331 (Ala. 1968).

Op. S.C. Atty. Gen., No. 86 - 83, July 24, 1986 (1986 WL 192041). We added the following in a subsequent opinion:

> To determine whether the service charges imposed upon non-residents may amount to a tax in a respect other than on the face of it would require fact-finding and thus would be beyond the scope of an opinion of this Office. Op.Atty.Gen. dated December 9, 1983. Such would be within the province of the courts or other appropriate fact-finding body.

Op. S.C. Atty. Gen., July 17, 1989 (1989 WL 508567). Pursuant to our prior opinions, it would appear that the water rates charged by the City of Anderson to nonresidents are not taxation without representation since they are not taxes. However, this is a factual matter that would have to be determined by a court.

You also state that you have a letter from the City Manager in which the City of Anderson said that it would give the same rates to nonresidents as residents after Duke Power, the former water-provider, sold its water rights to the City. Unfortunately, this Office can not determine whether the letter is a contract.

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[2] The Public Service Commission is granted the power to regulate public utilities in section 58-3-140 of the South Carolina Code.

"Of course, as we have repeatedly stressed, this Office is not able to comment in an opinion upon the validity of a particular contract previously entered between a state agency and others. Op. Atty. Gen., Op. No. 85-132 (November 15, 1985). Such involves factual determinations which this Office has no authority to make in a legal opinion. Op. Atty. Gen., December 12, 1983." *See* Op. Atty. Gen., September 12, 1996 (1996 WL 599418).

CONCLUSION

In conclusion, this Office believes that the law is as follows:

1. The City of Anderson can charge people who live outside the city limits higher rates for water than it charges its residents.

2. It does not violate either the "equal protection" or the "due process" clauses of the South Carolina Constitution for the City of Anderson to charge people who live outside the city limits more for water.

3. Title 58 of the South Carolina Code is not applicable to a municipality which provides water.

4. It would appear that the water rates charged by the City of Anderson to nonresidents are not taxation without representation since they are not taxes. However, this is a factual matter that would have to be determined by a court.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,

Elinor V. Lister

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Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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